

**Lucky Stores, Inc., d/b/a Gemco and United Food
and Commercial Workers Local Union No. 455,
AFL-CIO. Case 23-CA-8988**

23 August 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS**

On 16 August 1983 Administrative Law Judge Robert A. Gritta issued the attached decision. The Charging Party, the General Counsel, and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, as modified herein, but not to adopt his recommended Order.²

We agree with the judge that the Respondent unlawfully promulgated, maintained, and applied an oral no-solicitation rule in early 1982 which prohibited solicitation on "company time." We so find for all the reasons the judge stated, except that we do not rely on his citation of *T.R.W. Bearings*, 257 NLRB 442 (1981), which has since been overruled by *Our Way, Inc.*, 268 NLRB 394 (1983).³

We agree with the judge that the Respondent posted a lawful employee no-solicitation rule in July 1982. We do not agree with the judge, however, that the no-distribution rule posted at the same time was invalid.⁴ The rule prohibited distribution

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge's finding that Watkins was unlawfully discharged. Indeed, it is well established that a discharge for union solicitation based on an invalid no-solicitation rule violates Sec. 8(a)(3) regardless of any specific intent. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945).

² The judge found that the Respondent unlawfully discharged Rosalyn Watkins and that she was entitled to reinstatement and backpay, but he inadvertently failed to provide for reinstatement and backpay in his recommended Order. We have so provided in our Order.

³ See *Paceco, a Division of Fruehauf*, 237 NLRB 399, 401 (1978); *Florida Steel Corp.*, 215 NLRB 97, 98-99 (1974). Member Zimmerman dissented in *Our Way* and continues to rely on the common sense, practical rules set forth in *T.R.W.*

⁴ The text of both rules is as follows:

Solicitation by the Company's employees at any time during the work day when either the person doing the solicitation or the person being solicited is required to be engaged in the performance of his or her work tasks is prohibited.

Distributing literature, written or printed material of any kind among employees at times when either the distributing employee or the employee receiving the material is supposed to be actually engaged in the performance of his or her work tasks is prohibited. Dis-

"at all times" in the "working areas" of the store. The judge found that the "at all times" prohibition was overly broad in that it included an employee's nonworktime and that the "working areas" prohibited was overly broad in that it restricted distribution in areas other than those where retail sales were actually taking place. The Board has consistently held that it is lawful to prohibit distribution in all working areas, even while an employee is on nonworktime.⁵ Accordingly, we find that the Respondent's posted no-distribution rule did not violate the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Lucky Stores, Inc., d/b/a Gemco, Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making or enforcing oral no-solicitation rules which are unlawful.

(b) Warning or discharging its employees pursuant to unlawful oral no-solicitation rules.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the oral no-solicitation rule unlawfully promulgated in January 1982 and notify the employees that the rule no longer exists.

(b) Offer Rosalyn Watkins immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits resulting from her discharge, less any net earnings, plus interest.

(c) Remove from its files any reference to the unlawful warnings and discharge and notify Watkins in writing that this has been done and that the warnings and discharge will not be used against her in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

tribution is also prohibited at all times in the working areas of the store.

⁵ *Vapor Corp.*, 242 NLRB 776, 790 (1979); *Contract Knitter*, 220 NLRB 558, 560 (1975); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

(e) Post at its Interstate 10 store⁶ in Houston, Texas, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁶ In his recommended Order the judge required that notices be posted at all the Respondent's Houston, Texas stores. The Board ordinarily limits its posting requirements to the location where an unfair labor practice has occurred, unless the evidence demonstrates that an employer has a corporatewide proclivity to violate the Act. We find no such showing herein and limit the posting requirement to the Respondent's interstate 10 store.

⁷ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT make or enforce oral no-solicitation rules which are unlawful.

WE WILL NOT warn or discharge any of you pursuant to unlawful oral no-solicitation rules.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exer-

cise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the oral no-solicitation rule promulgated in January 1982 and notify you that the rule no longer exists.

WE WILL offer Rosalyn Watkins immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her warnings and discharge and that the warnings and discharge will not be used against her in any way.

LUCKY STORES, INC., D/B/A GEMCO

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on January 13 and 14, 1983, in Houston, Texas, based on a charge filed by United Food and Commercial Workers Local Union No. 455, AFL-CIO (Union), on July 20, 1982, and a complaint issued by the Regional Director for Region 23 of the National Labor Relations Board on September 7, 1982.¹ The complaint alleged that Lucky Stores, Inc., d/b/a Gemco (Respondent) violated Section 8(a)(1) and (3) of the Act by promulgating and enforcing unlawful no-solicitation and no-distribution rules against union proponents and culminating in the discharge of one employee. Respondent's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel, Respondent, and the Union. All briefs were duly considered.

On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Lucky Stores, Inc., d/b/a Gemco is a California corporation engaged in the retail sale of food and general merchandise in Houston, Texas. Jurisdiction is not in

¹ All dates herein are in 1982 unless otherwise specified.

issue. Lucky Stores, Inc., d/b/a Gemco in the past 12 months, in the course and conduct of its business operations, purchased and received at its Houston facility goods and materials valued in excess of \$50,000 directly from points located outside the State of Texas. During this same period of time its business operations derived gross revenues in excess of \$500,000. I conclude and find that Lucky Stores, Inc., d/b/a Gemco is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Respondent operates several retail stores in the Houston, Texas area. One such is the store on interstate 10 employing approximately 70 employees. In all stores the store supervisor is the highest authority and is supported by an assistant store supervisor, area supervisors, and department heads, all admitted supervisors within the meaning of the Act. The day-to-day assignments and scheduling are implemented by the various supervisors. The premises of the interstate 10 store consist of a customer parking lot and a store building. Within the building are working areas and nonworking areas. Generally speaking, the working areas consist of the entire selling floor but the snackbar, which is public, is a nonworking area of the store for employees not assigned to duties in the snackbar. Several stock areas in the rear of the building are nonselling and nonwork areas except during specific inventory occasions. An employee entrance is maintained in the nonselling, nonworking part of the building adjacent to stockroom areas. Notices to employees are posted at the employee entrance and in areas adjacent to supervisors' offices. Not all employees are regular full-time employees, in that summer and seasonal temporary help are usually employed. Work rules and company policies are found in an employee handbook produced by the corporation which is distributed to all newly hired employees during orientation in each store.

The events under scrutiny took place in the interstate 10 store during the period December 1981 and culminated in July 1982. The pertinent portions of the testimony of supervisory and rank-and-file employees is detailed below.

III. ISSUES

1. Whether Respondent promulgated and maintained an unlawful oral no-solicitation rule.
2. Whether Respondent discharged for good cause its employee, Rosalyn Watkins.
3. Whether Respondent's written no-solicitation/no-distribution rule posted subsequent to Watkins' discharge was lawful.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

Rosalyn Watkins testified that she began her employment with Respondent in February 1979 as a clerk. Her most recent assignment in the store was as clerk in the

books and records department. Watkins had not seen, during her employment, any written rule pertaining to employee distributions and/or solicitations. In November 1981 Watkins solicited sales of candles for her church at the store. She solicited Store Manager Joel Berger and Assistant Manager Tyrone Williams to buy a candle while she was on the clock. Both Berger and Williams perused the order blank and indicated a preference before returning the blank to Watkins. The same day an outside salesman, Frank Gianetti, was standing in the snackbar with Berger. Although Watkins was on the clock, she solicited Gianetti to buy a candle. Berger suggested to Gianetti that it was for a good cause and Gianetti chose a candle from the order blank. Later the same day, while she was working, Watkins solicited Tyrone Williams who also chose a candle from the order blank. The following month Joan Street, department head of domestics, came to Watkins' register soliciting the sale of soaps for her daughter's school. Watkins made a choice and returned the order blank to Street while still on the register. On April 2 about 5:30 p.m., while Watkins was in the warehouse, Berger engaged her in conversation. Berger began the conversation stating, "I will start with saying that you are protected under the Labor Act. At 9 a.m. this morning I observed you signing in. Twenty-five minutes later I observed you talking to employees that are not protected by the Labor Act. After that I observed you in the snackbar. We expect an honest day's work for an honest day's pay." Watkins protested, saying she was doing her furniture count in the warehouse when Street needed help getting some push carts to her department, but Berger interrupted her repeating himself and adding, "You are not to solicit for the Union on company time. Remember what I said." Watkins then left the warehouse. Within 30 minutes Watkins made notes of the conversation in a diary she was keeping.

On July 10, about 3:30 p.m., after being relieved for her break, Watkins asked Tim Londene, who had just used the phone at her check stand saying he was going on break, if anyone had talked to him about the Union and if he wanted to sign a card. Tim said he did, so Watkins gave him a card telling him to take it to the bathroom and fill it out then return it to her. Tim did so while Watkins waited. She then saw "Doug" and repeated her solicitation to him. She gave "Doug" a card and before she got to the snackbar "Doug" returned it to her. Watkins then ordered a coke in the snackbar and sat down. Tim was in the snackbar also. Soon Berger came into the snackbar and talked to Tim then left. Shortly he came back to the bar. Berger came to Watkins and told her she had been warned before about soliciting for the Union on company time. Berger told her that the only time she could solicit for the Union was during breaks and lunch. Berger then asked Watkins if she had given Tim a card. Watkins denied giving Tim a card and Berger said he would have to take it up further. Around 4 p.m. Watkins was summoned to Berger's office. She asked to have Glenn, the union representative, as a witness. Berger denied that request but said she could have an employee. She then asked for Joan Street as a witness. Berger, in turn, summoned Joan Street. Berger an-

nounced to Street that Watkins was "up there" on a no-solicitation rule. Berger reminded Watkins of a past conversation between the two of them about soliciting for the Union on company time. Watkins acknowledged the conversation. Berger then cited a more recent conversation with Supervisor Larry Woods on the same subject. Watkins denied any solicitation discussion with Woods. Berger then asked if she still denied giving Tim a card on company time. Watkins responded, "Yes." Berger called Tim Londene into the office. Berger asked Tim if Watkins had given him a union card to sign at a time when both he and she were on company time. Tim replied affirmatively. Berger then asked if Watkins still denied it. Watkins again denied it. Berger then said, "You are now terminated for insubordination. Go sign out." Within 40 minutes Watkins recorded in her diary the substance of the conversation.

Joan Street testified that she has been head of the domestics department for 7 years. During her employment, including up to the present time, supervisors and rank-and-file employees solicit among themselves for various charities, football pools, and personal sympathies of employees and their relatives. There was never a written rule against employee solicitations until late July. At that time a written rule was posted on the warehouse door used as an employee entrance. Street recalled she herself solicited Watkins and five other clerk employees to buy soap in December 1981 while she and the clerks were working. Street was on duty in late 1981 with Supervisors Margie Davidson and Joan Parker when they three were approached by a clerk to join a football pool. All three supervisors joined the pool. In late 1982 Linda Bellard, a clerk, circulated a get-well card for signatures and collected a dollar from each employee signatory, to buy a fruit basket for Margie Davidson's husband. Bellard also, during this time frame, circulated a birthday card for signatures and collected a dollar from each employee who signed.

Street attended two meetings of supervisors called by Berger in January and February to discuss the union organizational drive and the solicitation rule. Berger told the group that employees could not solicit for the Union while they were working however they could solicit on their breaks and lunchtimes but only in the snackbar, not in the working areas of the store.² Berger gave each supervisor a packet to study and directed each to inform their employees of the no-solicitation rules. Street did inform her employees that union solicitations could only take place in the snackbar and while employees were not working or when not on company time, however, she does not recall exactly what words she used.

On July 10, about 4 p.m., Street was summoned to Berger's office as a witness for Watkins. On arriving Street was informed by Berger that Watkins was in the office on the no-solicitation rule. He had Watkins' personnel folder before him and he showed Watkins her certification that she read the employee handbook. Watkins confirmed that she had and Berger read the rule on

insubordination. Berger told Watkins that she had been warned not to solicit union cards on company time. He told Watkins she was seen passing a card to Tim Londene. Berger asked Watkins if she passed a card to Londene but she denied doing it. Berger called Tim into the office. He asked Tim if Rosalyn passed him an authorization card. Tim said yes. Berger asked Tim where he was when he got the card. Tim said in books and records. Berger then asked if Tim was on company time and if Rosalyn was on company time. Tim answered yes to both questions. Berger excused Tim and again asked Rosalyn if she passed a card to Tim. Rosalyn said she did not. Rosalyn was then terminated and the meeting ended. Street, at the behest of Berger, on July 12 made a written memo of the meeting and gave it to Berger.

Larry Woods, hard-goods manager, testified that he has been manager for four years. He has responsibility for sporting goods, drugs, health and beauty aids, patio, automotive, housewares, and the books and records department. In January 1982, he attended a meeting of all supervisors called by Berger. Berger's meeting followed a store managers' meeting called by corporate officials visiting from California. The managers' meeting was called because the union situation was starting and supervisors had to know what they could and could not do. At this time there was not a no-solicitation rule posted, so Berger told the supervisors when and where employees could solicit. Berger advised the supervisors that soliciting was not to be done in the building unless employees are on break or lunch and in a nonwork area. After the meeting each supervisor was given a packet by Berger but the only "no-solicitation rule" contained in the packet was the "non-employee" rule.

Woods stated that he had discussed union solicitations with Watkins in March when reviewing her shoppers report³ and in the presence of Tyrone Williams, assistant store supervisor. Woods discussed the report with Watkins telling her which areas she had to concentrate on to improve her work performance. Woods testified he also told Watkins, "Rosalyn, as you well know, there is a lot of things going on in this store and as far as the union situation, it is your God-given right to join it, not to join it, to get other people to join it or not to get other people to join it. The only thing we are asking you to do is to go with the policies and the rules that you were given, that you are given now. If we are going to play the game, let's play by the rules." Woods also told Watkins that the rules were, "While she is on the time she is working and in the work area, she is not to solicit or to be solicited by anyone in this building, unless you are in a nonwork area and on your break or lunch." Of the four shopper reports available in March, Watkins was the only employee with whom the no-solicitation rule was discussed in conjunction with the shopper's report.

On July 10, Woods was called to Berger's office to witness the confrontation with Watkins. Watkins requested and was allowed to have Joan Street as her witness. When all parties were present, Berger asked Watkins if

² At the time of the instant campaign, the employees did not have a nonpublic break area. By trial however, the employees did have a private break area in the store.

³ Commercial Service Systems is an outside organization that shops in stores and evaluates the employees who service them.

she had given Tim Londene a union card. Watkins said she had not. Berger then called Londene into the room and asked him if Watkins gave him a card. Tim said she did. Berger asked Londene if he was on break at the time to which he replied "No." Berger then asked if Watkins was on break at the time and Londene said, "I don't think she was." Berger excused Londene and asked Watkins again if she had given a card to Londene. She again said, "No." Berger reminded Watkins of two prior warnings about soliciting for the Union and informed her that she had violated the insubordination rule and was terminated. Sometime after Rosalyn Watkins was terminated, a written no-solicitation/no-distribution rule was posted in the employee area of the store.

Joel Berger, store supervisor, testified that he has been employed by Respondent for 20 years. He is the responsible supervisor for the entire store. In January Pat Murphy, vice president of public relations, and Dave Hauk, subordinate, held a meeting of Texas store supervisors, and Roger Campbell, district manager, informing the group that Respondent was targeted for organization by the Union. The group received a 4-hour crash course on the National Labor Relations Act and what they could and could not do. During the meeting a no-solicitation rule was discussed. Documents, including a written no-solicitation/no-distribution rule, were distributed to each store supervisor preparatory to group discussion of each. Both Murphy and Hauk explained that employees had the right to solicit while on a break or at lunchtime. Company time and working time were defined as time when employees should be working and could not solicit. Hauk stated to the group that employee solicitations or distributions could only occur on break or lunchtime and then only in the snackbar.

Within 24 hours Berger called a meeting of his supervisors and department heads. Berger supplied copies of the previous documents to his supervisors and department heads at the meeting. Berger, in turn, explained to the group what each document meant. Berger testified, "I explained to them that if an employee was on a break or a lunch in a non-working area, that they had a right to discuss union authorization activity or whatever, or anything else they wanted to talk about." The only non-working area was defined as the snackbar. Berger stated that each employee involved had to be on break or lunch and not on working time or company time. Berger did not detail the restrooms as nonworking areas in the store.

During the meeting none of the group asked any questions regarding enforcement of the no-solicitation/no-distribution rule as outlined by Berger. Berger instructed the supervisors and department heads to discuss all of the information with their employees. Following that meeting Berger was told that a new no-solicitation rule would be sent to Campbell who in turn would distribute it to the stores for posting. Berger and other store supervisors received the new rule from Campbell and posted it. However, the rule posted by the store dealt only with nonemployee solicitations.⁴ An employee no-soli-

citation/no-distribution rule was not posted until after Watkins was terminated and only then when Berger was discussing Watkins' termination with Hauk in California. On discovering the posting error Hauk sent the employee no solicitation/no-distribution rule to Berger for posting. He removed the non-employee solicitation rule from the employee entrance door and posted it at the front of the store. The employee no-solicitation/no-distribution rule was then posted on the employee entrance door.

In February, Berger observed Watkins in the warehouse talking to Joan Street when she was supposed to be taking inventory of furniture. Street was working on her merchandise while Watkins was simply standing and talking. They talked for 7 to 10 minutes then Watkins went to the snackbar and got a cup of coffee. Berger checked the work schedule to determine whether Watkins was scheduled for a break at that time. She was not. Later in the day, Berger stopped Watkins for a conversation. Berger began the conversation with, "You are protected under the National Labor Relations Act; Joan Street is not protected under the National Labor Relations Act. She, as I, is considered supervisory personnel. You have the right to solicit on your break and your lunch in a non-working area of the store with another employee if they are not on a break or a lunch." The two disagreed on whether Watkins was, in fact, doing her assigned work at the time and whether she had taken a coffee break at the proper time. Berger asked Watkins if she understood and Watkins replied that she did not know what Berger was talking about but she did understand what he said. Berger did not warn Watkins that further infractions could lead to discharge.

Berger was informed by Larry Woods and Tyrone Williams that in May or June, while discussing a commercial service systems report with Watkins, they also reviewed the no-solicitation/no-distribution rule with her.

Watkins on her day off would come in the store wearing a T-shirt with the legend "Join the Union" and trying to get employees off to the side and talk to them. On one occasion she requested a Saturday off that she was scheduled to work, so she could go camping. Her schedule was rearranged to accommodate her and she was seen visiting one of the other stores wearing her T-shirt, distributing union literature in the restrooms and talking to employees. Berger described Watkins' performance in the other store on that Saturday as "trying to cause a scene."

On July 10, Berger was in the snackbar when Joan Parker remarked that Rosalyn Watkins was passing cards. Berger moved to the aisle and saw a white card change hands between Watkins and Tim Londene. They were within 5 or 6 feet of Watkins' cash register. Berger was upset by what he saw and he walked around the store. In five minutes he saw Londene outside bringing in shopping carts. Berger asked Londene if Watkins passed him a union authorization card. Tim said she did. Berger then asked Tim if either were on break or lunch. Tim replied, "No," to each question. Londene explained to Berger that Watkins gave him the card, instructed him to go to the restroom and fill it out and not to let any-

⁴ Berger stated that all the stores made the same posting error. In Berger's case he did not specifically call any supervisors or employees attention to the new rule after it was posted.

body see him with it, then bring it back to her. Londene asked, "Have I done anything wrong?" Berger responded, "No, you haven't. Go back to work." Berger went back in the store and Watkins was in the snackbar on break. Berger asked her if she solicited Londene and Watkins denied knowing anything about it. Berger went to his office to confirm that Watkins had read the employee handbook previously and then called District Manager Campbell explaining that Watkins had been seen passing cards to two courtesy clerks during working hours in spite of the fact that she had been warned twice before about soliciting, once by himself and again by Larry Woods and Tyrone Williams. Berger was told to hold off doing anything until consultation with Murphy in California. Campbell was unable to contact Murphy so he told Berger to go ahead and do it. Berger said his policy was to warn an employee twice before termination, except in the case of dishonesty, being drunk on the job, or insubordination. Although he did not give a warning to either of the courtesy clerks for violating the no-solicitation rule, he did discipline Watkins for her conduct.

Berger called Watkins on the interphone asking her to come to his office. Watkins inquired if the previous questions of card passing were the reason for the office visit. Berger replied that they were, so Watkins asked for a witness to be present. Berger agreed to Joan Street as the witness. Larry Woods also was summoned as a witness. After all persons assembled in Berger's office he verified from Watkins that she had read the employee handbook. Berger explained to Watkins that she had read the employee handbook. Berger explained to Watkins that she had violated his instructions that she could not solicit on company time. He reminded her of the two previous warnings concerning soliciting on company time. Watkins professed ignorance of any solicitation. Tim Londene was called into the office. Tim stated that Watkins had given him a card to sign when neither employee was on break. Watkins continued denying Berger's accusation but Berger terminated her for violations of his instructions for soliciting by employees on behalf of the Union.

Berger stated that he was aware of the nonunion solicitations that took place in the store but in his knowledge they all were conducted in the snackbar. On several occasions in the past (as far in the past as 7 to 10 years) he has stopped solicitations on the selling floor and told employees that the solicitations can only be conducted in the snackbar. Berger has, however, signed several greeting cards for employees while in his office.

Tyrone Williams testified that he has been the assistant store supervisor for 2 years. Williams attended the January meeting of supervisors and department heads. After the meeting Williams talked to the maintenance crew, the courtesy clerks, and some of the sales clerks to explain the no-solicitation rule. He talked to one or two at a time over a period of 2 months. Williams failed however to inform later hired employees of the no-solicitation rule. Williams told employees they could not solicit on company time. To solicit they had to be in a nonworking area like the snackbar on their lunch hour. They could

do whatever they wanted if they were doing it somewhere other than the parking lot or the store building.

In March, in the company of Mr. Woods, Williams discussed a shoppers' report with Watkins. After pointing out the weak areas to Watkins, both Williams and Woods felt a need to clarify things for Watkins. Watkins was obviously involved in the union activity and neither gentleman wanted her to fall into a trap. Watkins was not being reprimanded for any solicitations she had engaged in prior to this time. They told Watkins that she could not solicit on company time or while the other employee was working. Watkins was told she could solicit in the snackbar on her lunch hour, in a nonworking area or when she was on her own time.

Williams has taken part in football pools, but not while performing his duties. Williams has not seen other employees participating in football pools when they should be performing their duties.

The employee no-solicitation rule that was posted in July was not specifically pointed out to any employees. The rule was simply posted and that was it. Williams has not reprimanded any employee for violating the no-solicitation rule. However, in the case of Watkins, her termination report was in error. The reason for termination should have been "insubordination" rather than "soliciting on company time."

Tim Londene testified that he has worked for Respondent as a courtesy clerk for 6-1/2 months. He got the job during one of Berger's visits to the Londene home. Berger has been a Londene family friend for at least 10 years including guesting at the Londene's home for a night or a week at a time. On July 10 Watkins kept telling him that she needed to talk to him about something. In between pushing baskets and his other duties Londene stopped in Watkins' department to see what she wanted. Watkins asked Londene if he wanted to sign a union card. Londene replied "Yes" so Watkins gave him a card and told him to take it to the bathroom, sign it, and bring it back to her but don't let anyone see him doing it. Londene was not on break at the time and had no knowledge of Watkins' status. Later, Berger stopped Londene and told him he did not have to answer if he did not want to but Berger wanted to know if anyone had given Londene a card. Londene said, "Yes," in the books and records department. Berger left and returned shortly saying that Watkins denied giving Londene a card. Berger asked Londene if he would make a statement in the office. Londene replied he would. Berger called Londene to the office later. When Londene got to the office Berger, Woods, and Watkins were there. Berger had Londene repeat the card incident and added questions to Londene about break status for Watkins and him. Londene said he was not on break but did not know about Watkins. Berger then excused Londene from the office. Londene did not participate in any football pools or greeting-card solicitations, nor was he ever asked. Londene has not observed any other employees soliciting in working areas on nonbreak time.

Joan Parker testified that she is head of the ladies department and worked in that capacity during 1982. She attended the January meeting with Berger and other su-

pervisors. The whole meeting was about the Union and a lot was discussed. During the meeting Berger explained the no-solicitation rule thusly; "He told us that we couldn't at anytime have any solicitation on the job. If we wanted to do anything whatsoever, it could be done on your break or on your lunch, but not while you were on duty." After the meeting, Parker told her employees in a group that they could not participate in any solicitations while they were on duty but could while on break or at lunch and only in the snackbar or the stockroom in back. Parker has not seen employees engaged in solicitations for birthdays or greeting cards in the working areas of the store while the employees are supposed to be working. Neither has she been solicited during the time she was performing the duties of her job. Parker, herself, has solicited employees for birthday gifts but always in the snackbar on break. Parker did sign a birthday card for Bellard while on break in the stockroom.

On July 10 Parker was seated in the snackbar with Berger, Woods, and Margie Davidson having coffee. Parker saw cart boy Ensley give a union card to Watkins which she assumed was solicited by Watkins because Watkins had been doing a lot of soliciting in the store. Parker remarked, "I can't believe she is doing this." Parker told the group what she saw and Berger got up and left the snackbar. Parker was well aware of what a union card was because a lot of union cards had been passed around the store. Watkins then came into the snackbar and got something to drink.

Margie Davidson testified that she has been a department head for 7 years. In the January meeting Berger told the department heads and supervisors that there would be no solicitations at all on the floor. If anything was done it had to be on break or lunch and in the snackbar or stockroom. Davidson, immediately after the meeting, told her employees that the store said there would be no solicitation at all and that goes for everybody. Davidson further told the employees if any soliciting was done it had to be at lunch or breaks in the snackbar or her office. Davidson has not informed a newly hired employee about the no-solicitation rule. Her meeting with employees after the January meeting was the first occasion in her 7 years as department head to inform employees soliciting for greeting cards or gifts while employees were working at their duties nor has she been solicited by any employee while either was supposed to be working. Davidson has signed a birthday card solicited by Linda Bellard while on break in the stockroom, albeit Davidson considers the stockroom and her office to be working areas in the store and not allowable locations for solicitations under the written rule posted by Respondent.

Linda Bellard testified that she has been employed by Respondent as a sales clerk over one year. She has been supervised by Margie Davidson, Joan Street, and Joan Parker. During the course of her employment no supervisor ever explained to her the company rule on employee solicitations. She did however engage in employee solicitations. In January she was solicited to join a football pool while she was working at her checkstand. She accepted and paid the employee for her choices. Tyrone Williams saw the solicitation but said nothing to either

employee. Williams did talk to Bellard about other things immediately thereafter. In May, Bellard, employees Debbie Hickey, and Department Head Craig Thomas were congregated at Bellard's register while each was working. Employee Sherry Jones asked each to sign a card for a departing employee and contribute to a gift and they did. Shortly thereafter Craig Stedman, soft goods manager, came by and was asked to join the card signing, which he did. During October two clerks were leaving employment and Margie Davidson gave two greeting cards to Bellard telling her to get employees' signatures and collect for gifts. Bellard visited several departments, soliciting employees and Supervisors Joan Street and Joan Parker. Bellard as well as the employees and supervisors solicited were working at their duties in the working areas of the store while the cards were circulated. Later in October Bellard's birthday was celebrated in the store with a card, gift, and a cupcake. Margie Davidson approached Bellard while she was checking out a customer and told her to come to the stockroom when she was finished with the customer. Bellard went to the stockroom, as suggested, and Margie Davidson presented her with the birthday card, gift, and cupcake. The following month Margie Davidson's husband was in the hospital. Bellard, during her working duties, got a card and circulated it in the departments for signatures and a gift donation. Supervisors Parker and Street were solicited at their work stations while they were working. Bellard stated that none of the solicitations she engaged in took place in the nonworking area of the store known as the snackbar.

Analysis and Conclusions

Although the witnesses have testified to slightly different versions of the critical events there are few factual disputes in those areas necessary to a determination. The testimony can best be described as disjointed, giving rise to a collection of partial facts. The case really turns on the application of these partial facts to the outstanding law.

The General Counsel alleges in his complaint that the no-solicitation rule promulgated in early 1982 is unlawful in several respects, i.e., motivation for promulgation, the rule itself, and the discipline maintained under the rule.

The record evidence is clear that the January meeting conducted by the California management people (the crash course on the NLRA) was precipitated by the presence of a union organizer distributing union cards in the store's parking lot in December 1981. Berger himself saw the organizer and the California management reported to the Texas store supervisors in the meeting that Respondent had been targeted by the Union for an organizational desire. Additionally, Berger testified that concurrent with the organizers' presence a trade journal had listed Respondent as a target of the Union. Thus, the circumstance that was new to Berger and his fellow store supervisors and which required preparation and deliberation was the organizing campaign of the Union. One outgrowth of this meeting was the anticipated receipt of a printed no-solicitation/no-distribution rule that was to be posted for employees of each store for the first time in

most recent years. A second outgrowth was Berger's meeting with his supervisors and department heads within 24 hours. The purpose of Berger's meeting was to impart to his supervisors what he had learned in the previous management meeting. The single outgrowth of this meeting was Berger's instructions to his supervisors and department heads to explain to their employees the Respondent's no-solicitation/no-distribution rule that was yet to be posted. With some exceptions the supervisors and department heads did as instructed by Berger. I, therefore, conclude and find that Respondent's reason for instituting the oral no-solicitation rule in January was the advent of the union's organizational drive among Respondent's employees at its Houston stores. In my view, clearer unlawful motivation for promulgation of a rule could not be found. Accordingly, I further conclude and find that Respondent by promulgating its oral no-solicitation rule in January has violated Section 8(a)(1) of the Act.

The rule itself: Although no two supervisory witnesses stated the rule alike, all their testimony contained the same theme. No solicitation by employees on "*company time*" in "*working areas*." In some witnesses' testimony, such as Berger's and Watkins' the "*company time*" proscription was explicit. The thrust of all the testimony was simply that employees on the selling floor were prohibited from soliciting. There was some testimony that the times and places the employees could solicit were explained to be breaks and lunchtimes and in the snackbar or back stockroom. But even a given witness' testimony was not consistent with the explanation. Assistant Store Supervisor Williams prohibited solicitation by employees on the *premises*, which he identified to be the parking lot and building. Berger vacillated between the "*company time*" proscription and allowing solicitation when employees were on break or lunch. In any event the explanation of the rule by the supervisors was not consistent nor were all employees recipients of any explanation. All witnesses agreed that whatever writing was posted, the employees' attention was not addressed to the writing nor was the written rule, which each supervisor received from Berger in the January meeting, used by the supervisor as a guide when explaining the rule to employees. Therefore, some employees received different explanations of what Respondent characterized as its longstanding rule against solicitations. As I view the record testimony, the understanding of the no-solicitation rule harbored by the supervisor personnel was as perfunctory as the different explanations offered to employees as a standard. I find the undiscovered error, in posting the wrong written rule, to be instructive of store management's lack of understanding. It is not difficult to understand why rank-and-file employees and supervisors, alike, were unsure whether solicitations other than "Union," took place in violation of the oral company rule. Berger expressed ignorance of most employee solicitations for birthdays, hospital confinements, or sports pools in spite of the fact that he loathes office work and spends that vast majority of his time on the floor among the employ-

ees.⁵ I conclude and find that Respondent's oral no-solicitation rule, as announced by Berger to supervisors and employees and as further explained by supervisors and department heads to portions of the work force, is an invalid rule. The stated rule and its explanations are violative on several counts; to wit, a proscription of "*company time*" tends to restrain employees from engaging in lawful activity guaranteed by Section 7 of the Act and a failure to define, unequivocally, to all employees the areas of company property in which lawful solicitations may take place further restrains employees in the exercise of their guaranteed rights of self-organization. The obvious confusion on "non-working areas" evinced in the record testimony, standing alone would, in my view, invalidate the rule but when the assistant store supervisor defines the "solicitation" area as outside the building and off the parking lot (what they do at the 7-11 store is their personal business) there is no room for doubt of the rule's invalidity. Accordingly, I conclude and find that Respondent's oral rule against solicitation, including the various explanations thereof, is overly broad and fails to satisfy the Board's law on no-solicitation/no-distribution rules.⁶

Watkins' Discharge

The General Counsel correctly argues that any discipline based on an invalid no-solicitation rule is presumptively invalid. However, that does not carry the day for the General Counsel. The General Counsel must make out a *prima facie* case of discrimination.⁷ In my view, the General Counsel did present a *prima facie* case of discrimination involving the discharge of Rosalyn Watkins. Thus: Watkins was tagged a union proponent early in the campaign by Berger; her organizational efforts were not confined to her own store in that she organized in other of Respondent's stores and at a time when she was given time off for personal activity; Watkins obviously was the main union proponent in her store for she was, admittedly, the only employee singled out by Berger, Williams, and Woods for extra attention vis-a-vis employee solicitations and the company rule; Berger's defense of the ultimate discipline for Watkins was based upon his personal procedure of two warnings before termination (which finds some support among the Respondent's written policies and work rules); however, the two events cited in the record do not constitute warnings nor is either event based on an employee solicitation by Watkins. Berger did not investigate the first event involving Street and Watkins in terms of the substance of the no-solicitation rule. That is to say, Berger did not establish that Watkins was in fact soliciting nor did he establish, if she was soliciting, that it was in violation of the company rule by any understanding. Just as clear was his ad-

⁵ I do not credit the testimony of the various supervisors that non-union solicitations only took place in the snackbar and while all employees involved were on break. Such statements are implausible, under all the evidence, and contrary to the admitted free atmosphere of the store prior to any rule announcement.

⁶ *J.C. Penney Co.*, 266 NLRB 1223 (1983); *T.R.W. Bearings*, 257 NLRB 442 (1981).

⁷ *Wright Line*, 251 NLRB 1083 (1980).

monition to Watkins wherein he only sought her understanding of his quoted rule rather than detailing any infraction. The second event was expressly denied to be discipline or a warning for any infraction of the no-solicitation rule. As Woods expressed it he did not want Watkins, who was most active union-wise, to fall into a trap by disregarding the rule; Berger administered discipline under the rule disparately when he terminated Watkins. Berger, acting upon a report from Supervisor Parker that Watkins was engaged in union solicitation with employee Ensley, observed Watkins and saw a union card exchanged between employee Londene and Watkins. Berger determined that the Company's no-solicitation rule had been violated by Watkins, Ensley, and Londene, but only Watkins was disciplined. Rather than discipline Londene, Berger only counseled him on future union solicitations. In the case of Ensley, Berger did nothing. Berger's investigation of the factors necessary to establish an infraction of *any* rule leaves everything to be desired. Additionally, the evidence shows that Berger and other supervisors, upon observing employee solicitations not related to the Union, simply explained to the employees involved that the solicitation can only take place in the snackbar, never on the selling floor. Respondent argues that communication and explanation of the no-solicitation rule to the employees was of paramount importance citing the testimony of Berger, Williams, and Woods. Indeed, the rule was paramount for Watkins and her union solicitations as all three gentlemen evinced by their attention only to Watkins. Berger, who held 15 supervisory meetings a year, only saw fit to discuss the rule at one such meeting; and lastly, Berger's labeling of the cause for discharge a "insubordination" is a transparent attempt to isolate the event of union solicitation from the reprisal of discipline. Berger testified that the "insubordination" of which Watkins was guilty was simply her failure to follow the instructions of her supervisor. The admitted instructions were the two restatements of the oral no-solicitation rule which ostensibly precipitated warnings. It appears crystal clear that the cause for discharge, by any other name, is nothing more or less than Watkins engaging in union solicitations on the selling floor, on company time, on company premises, and contrary to specific instructions from management. Berger's demonstrated animus toward Watkins as the union leader in his store precludes any other determination of Watkins' discharge. Further, Respondent failed to produce credible evidence to overcome the General Counsel's prima facie case. I therefore conclude and find that Respondent, through its supervisor, Berger, discriminatorily discharged employee Rosalyn Watkins in violation of Section 8(a)(3) of the Act and shall order the violation remedied.

The posted written rule: Respondent finally posted its written no-solicitation/no-distribution rule after Watkins was terminated. The record evidence shows the posted rule to be identical to that discussed in the management meeting of January. The rule, as Respondent's written no-solicitation/no-distribution policy, must comport with the Board's requirements expressed in the cases.⁸ The

General Counsel has attacked the facial validity of the rule with regards to both solicitations and distributions. It is axiomatic that an employer may restrict the exercise of Section 7 rights in the interest of productivity. Thus, the Board strikes the balance between employee statutory rights and an employer's right to direct its work force and police its premises. However, any no-solicitation/no-distribution rule must incorporate a clear statement that its restrictions do not apply during specified periods when employees are not actually performing their work tasks. Whether in the rule itself, or by way of explanatory communication, the employees must be advised that the proscriptions of the rule do not apply to legitimate nonworktime or to nonwork areas of the store. The Board tests recognize the unique feature of a selling floor in a retail establishment. Thus, solicitations and distributions alike may be prohibited on the selling floor but the selling floor must be defined distinctly. Respondent's written rule relating to solicitations is clear and unambiguous. When required to work, no solicitations, albeit, the rule does not state when employees may solicit. I do not find that this omission fails the test. The thrust of the Board's reasoning is clarity. I conclude that the solicitation portion of the rule is a valid expression of a no-solicitation policy. The distribution portion of the rule however does contain an ambiguity which fails the test. The rule prohibits distribution *at all times* in the *working areas* of the store. I conclude and find that *at all times* is overly broad in that it expressly includes an employee's nonworktime thereby restraining the free exercise of Section 7 rights. Further, the rule prohibits distribution in the *working areas* of the store. Again, the proscription is overly broad. All areas of the store can be defined as *working areas* but the employer can only restrict distribution in the working area where retail sales are actually taking place with the public. Failing an explanation of the rules use of the phrase, *working areas*, the rule as written is overly broad and restrains employees in the exercise of rights guaranteed by Section 7 of the Act. Accordingly, I conclude and find that Respondent's rule, in part, violates Section 8(a)(1) of the Act. Albeit it was the Respondent's intent to promulgate the written rule in January, such did not occur. The rule was not posted until late July and admittedly the late posting was the result of error. To hold that the late posting is a violation, due to the factual circumstances extant in January, in my view, would require an over-extension of the evidence of intent in the record. In addition, I do not conclude that the evidence of subsequent employee solicitations unrelated to the Union, particularly since those solicitations are not as obviously known to management, dictate a different result when considering the validity of the written rule's promulgation. I therefore conclude that, on this record, the promulgation of the written no-solicitation/no-distribution rule in late July did not violate the Act.

CONCLUSIONS OF LAW

1. Respondent's oral no-solicitation rule was unlawfully promulgated in January and the prohibitions contained therein also violate Section 8(a)(1) of the Act.

⁸ *J.C. Penney, TRW, supra.*

2. Respondent's termination of Rosalyn Watkins was discriminatory and violates Section 8(a)(1) and (3) of the Act.

3. Respondent's written no-solicitation/no-distribution rule posted in late July violates Section 8(a)(1) of the Act by the prohibitions contained in the no-distribution paragraph of the rule.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Rosalyn Watkins, an employee, I find it necessary to order it to offer her full reinstatement to her former position or if that position no longer exists, to a substantially equivalent position, with backpay computed on a quarterly basis and interest thereon to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977),⁹ from July 10, 1982, the date of discharge to the date of offer of reinstatement. Since Watkins engaged in union activities in stores other than her own I shall order the notice posted in each store in Houston, Texas.

[Recommended Order omitted from publication.]

⁹ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).